STATE OF WISCONSIN | PERSONNEL COMMISSION

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DANIEL L. MURRAY,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0105-PC

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RULING ON REQUEST FOR ATTORNEY'S FEES AND COSTS

This matter is before the Commission on appellant's request for attorney's fees and costs pursuant to §227.485, stats. By way of background, this matter involves an appeal pursuant to §230.44(1)(b), stats., of a reallocation. In a decision and order dated June 4, 1993, the Commission affirmed respondent's reallocation decision and dismissed the appeal. Appellant then petitioned for judicial review pursuant to §227.52, stats. In an oral decision rendered on April 29, 1994, the Dane County Circuit Court reversed the Commission decision. The Commission then filed an appeal in the Court of Appeals. The appellate proceeding was resolved prior to decision by a settlement agreement involving DER which included the reallocation of appellant's position to the desired level, and the restoration of the status quo prior to the appeal - i.e., the Circuit Court's decision would control.

In the underlying proceeding before the Commission, the stipulated issue involved the question of whether respondent's decision to reallocate appellant's position to Civil Engineer Supervisor 4 (CE Sup. 4) rather than Architect/Engineer Manager 1 (A/E Mgr. 1) was correct. The A/E Mgr. series class specification statement of "Inclusions" provides, inter alia: "[t]his series encompasses professional experts in the field of architecture or engineering that are predominantly executive and managerial." (emphasis supplied). The A/E Mgr. series class specification specifically excludes: "[p]ositions that do not perform predominantly executive and managerial functions in the field of architecture or engineering as defined in §111.81 Wis. Stats." The definition of the specific A/E Mgr. 1 classification is:

> ARCHITECT/ENGINEER MANAGER 1
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> This is professional managerial work in the field of architecture/engineering. Positions can function as a bureau director of a small, specialized and highly complex statewide architecture/engineering program OR as a chief architect/engineer for a small, complex agency architecture/engineering services program OR as a full-time deputy to an architect/engineer manager 2 OR as an assistant director to an architect/engineer manager 3 OR as a section chief/district chief in a major complex agency architecture/engineering services program OR any other comparable architect/engineer manager position.

The Commission observed that "[t]he most difficult issue raised by this appeal is whether the appellant qualifies as a manager so as to fall within the A/E Mgr. series." decision, 14. After considerable discussion of the record evidence bearing on this issue, the Commission reached the conclusion that appellant had not sustained his burden of proof on this issue, and affirmed respondent's decision.

Section 227.485(3), stats., provides for an award of costs to a prevailing party, such as the appellant, unless it is determined that "the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Section 227.485(2)(f) defines "substantially justified" as "having a reasonable basis in law and fact."

In appellant's underlying appeal, the Commission issued a twenty page decision (plus attachments) analyzing the evidence concerning respondent's reallocation decision. While remarking that [t]his is a close case, with arguments supporting either result," decision, 19, it ruled in respondent's favor. This resolution of this case is at least consistent with a finding that respondent's overall position was substantially justified. At this point, following the Court's reversal of the Commission's decision, it seems that the main question with respect to this request for costs and fees is whether, in light of the Court's decision, a conclusion that respondent's position was not substantially justified is indicated. This is the basis of appellant's position on the costs issue:

> The Personnel Commission originally upheld the respondent's classification decision, in the process finding the respondent's position, by inference, to be reasonable, and indeed correct. However, the Dane County Circuit Court, having the power to review the Commission's decision, found the Commission's decision to be legally unsustainable. The Circuit Court's decision was made notwithstanding a very demanding standard of review which had to be met by the appellant in order to convince the Circuit Court ... while the Personnel Commission may, and in fact did, find the respondent's position to be not only reasonable but

> correct, the Circuit Court has determined otherwise, and ruled that the Personnel Commission's decision was not sustainable. Thus, by extension and inference, the Circuit Court ruled that the respondent's position was without reasonable basis (i.e., unreasonable). Therefore, it could quite properly be argued that the Circuit Court, as a matter of law, has already determined the respondent's position to be unreasonable, and there can be no dispute at this point that the Circuit Court's decision is final and res judicata on that subject.

In its oral decision, the Court identified the commission's Finding 17 ("The appellant is not 'predominantly executive and managerial' as that phrase is used in the Architect/Engineer Manager series classification specification.") as "the focus of this dispute," and characterized it as "mixed question of law and fact in that it is a finding which requires the application of a legal standard to historical facts as they are found by the agency." Transcript of bench decisions, p. 3. The Court then pointed out that such questions are subject to limited review and "this Court must grant great deference to its [the Commission's] determination and only in the event that its determination is one which is unreasonable and especially were it to be found to be a conclusion based upon erroneous conclusions of law should this court intervene." T., pp. 3-4. The Court then proceeded, for a number of reasons, to reach the conclusion that the Commission's finding that appellant did not satisfy the "predominantly executive and managerial" criterion was unreasonable. The Court's decision must be taken into consideration in deciding this fee petition, but the Commission disagrees with appellant that it effectively determines its outcome.

First, the Court's conclusion is not, as appellant contends, res judicata on the §227.485 issue. Respondent was not a party to the Court proceeding, and the Court did not address the question of whether its (respondent's) position on the underlying controversy was substantially justified. Rather, the Court considered the question of whether the <u>Commission's</u> determination regarding appellant's managerial status was unreasonable in the context of a chapter 227 judicial review.

Second, in applying §227.485, it is a familiar principle that "[l]osing a case does not raise the presumption that the agency was not substantially justified." <u>Sheely v. DHSS</u>, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989). Appellant's approach conflicts with this principle because it would create a special, but relatively large category of cases -- an adjudicative agency's decision of a mixed question of fact and law -- as to which judicial reversal would lead <u>ipso</u>

facto to the conclusion that the original decision which had been litigated before the adjudicative agency was not substantially justified.

Third, federal precedent conflicts with a more or less automatic award of fees based on the Circuit Court decision. See, e.g., Howard v. Heckler, 581 F. Supp. 1231, 1233 (S.D. Ohio 1984):

> It is clear that the government's attempt to sustain the administrative decision may therefore be reasonable, even if the court determines that the decision was not supported by substantial evidence ... the substantial evidence inquiry and the substantial justification inquiry are two distinct inquiries. (citation omitted);

Houston Agricultural Credit Corp. v. United States, 736 F. 2d 233, 236 (5th Cir. 1984):

> Houston's argument that the finding by the jury that the Commissioner abused his discretion automatically requires an award of attorney's fees must fail. Were we to adopt Houston's reasoning, the government would be liable for attorney's fees whenever it loses a tax case, a result the Act clearly does not intend. (citation omitted);

Sierra Club v. Secretary of the Army, 820 F. 2d 513, 517 (1st Cir. 1987):

> [T]he test of reasonableness in the precincts patrolled by the EAJA is different from that applied for purposes of determining whether agency action or inaction is "reasonable" or "unreasonable," i.e., arbitrary and capricious, under, say, the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq ... Congress was painstaking in creating a distinct legal standard "substantially justified" -- for EAJA use, rather than merely echoing the familiar "arbitrary and capricious" refrain. We have equated that standard with a test of reasonableness -- but it remains, nonetheless, a test tailored to the dictates of the EAJA. (citations and footnote omitted)

Accordingly, the Commission must scrutinize the record before it is to determine whether respondent has satisfied its burden [1] of establishing that its position with respect to the underlying controversy was substantially justified. In so doing, the Court's conclusion that the Commission's decision was unreasonable under the standards for judicial review pursuant to the Administrative Procedure Act must be taken into consideration, but it is not conclusive.

Before addressing the particular point relied on by the Court in reaching its decision, the Commission wishes to emphasize that it is not attempting to relitigate the Court's decision. It was rendered final due to the

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[1] Sheeley v. DHSS, 150 Wis. 2d 320, 442 N.W. 2d 1 (1989).

settlement agreement that occurred while the matter was pending before the Court of Appeals, and it (the Court's decision) is dispositive with respect to the matters that were before the Court. However, some analysis of the Court's decision is inevitable in order to evaluate the extent to which the problems with the Commission's decision perceived by the Court can be attributed to respondent's underlying position.

Turning to the particular points with which the Court found fault with the Commission's decision, the Court relied heavily on what it concluded was a legal error in the decision:

> Thus here Mr. Murray is properly classified as an AE Manager-1 unless one of the exclusions shows that this is not the best fit for his actual job.
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> Here, the Commission relied upon the first exclusion and found Mr. Murray's job does not preform predominantly executive and managerial functions as defined in Section 111.81 of the statutes. In doing so, the Commission made a clear error of law in reaching the conclusion it did at page 19 of its decision and I quote from that decision. "The statutory definition of management indicates that it is the bureau level rather than the section level which has been selected as serving as the basis for defining where management responsibilities begin."
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> It must be remembered that Section 111.81 does not by legislative directive govern the determination made here. Section 111.81 was referenced in an administrative rule as a tool, as a help to the administrative agency, but it is a statute governing or relating to a different body of law all together. It incorporated this -- the Legislature did not itself say that this was the governing principle that would apply to determining classification allocations in civil service. The DER classification specifications themselves in reference to this specific issue defined the level at which the management responsibilities begin, and they specifically recite that a section chief is where management begins. To read the reference to the statute in the exclusion section as the Commission has would write out the definition section as providing the standard and this is improper; especially is this so where the statute uses the broadly inclusive language "including such officials as", and then goes on to describe several examples rather than restrictive limiting language. T., pp. 6-7.

At a later point in its discussion of the Commission's decision, the Court refers to the Commission having "been infected, if you will, by its view that management responsibilities begin at the bureau level." T., p. 12.

While in the Commission's opinion, it did not intend either to reach or rely on the conclusion the Court discusses, above, [2] the actual question on this

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[2] The Commission's decision analyzes a number of factors in determining whether appellant's position falls within the scope of the concept of "management." It did not intend to rely on §111.81(13) to exclude his position from this category merely because it is not at the bureau director level. Under

request for costs is not whether the Commission reached an erroneous conclusion of law, but first, whether respondent relied on this contention as part of its case, and second, if so, whether such reliance was substantially justified under the circumstances.

In its posthearing brief, respondent never argued that "management responsibilities begin at the bureau level," as the Court characterized the Commission's decision. Rather, respondent's brief recognized that the §111.81(13), stats., definition of management does not arbitrarily cut off management at the bureau level, but is to be read in the context of the entire class specification which is consistent with the concept of a section chief as "managerial":

> Sec. 111.81(13), Stats., defines "management" as including "personnel engaged predominantly in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads, and employes exercising similar functions and responsibilities as determined by the [Wisconsin Employment Relations] commission."
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> There is no question from this definition that division administrators, bureau directors and institutional heads are considered to be "management". It is also clear that employees who perform functions and responsibilities <u>similar</u> to division administrators, bureau directors and institutional heads may be "management", if the WERC so determines. For classification purposes, then, the issue is <u>whether Mr. Murray's duties and responsibilities are similar</u> to the functions performed by division administrators, bureau directors or institution heads.
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> The class specs for A/E Manager 1 also identify six allocation patterns at this level and include a listing of representative positions. The allocations include positions which function as (1) a bureau director of a small, specialized and highly complex statewide architecture/engineering program, (2) as a chief A/E for a small, complex agency A/E services program; (3) as a full-time deputy to an A/E Manager 2; (4) as an assistant director to an A/E Manager 3, (5) as a <u>sec-</u>

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the class specification and the statute incorporated by reference, a bureau director would be presumed to be managerial; a section chief could be if it "exercises similar functions and responsibilities." §111.81(13) Therefore, the Commission considered whether appellant's position "exercises similar functions and responsibilities" to a bureau director, as §111.81(13) provides. The statement at p. 19 of the Commission's decision that "[t]he statutory definition of 'management' indicates that it is the bureau level, rather than the section level, which has been selected as serving as the basis for defining where management responsibilities begin" is in the context of summing up the factors on both sides of the key issue. The Commission did not intend to apply this point to the exclusion of the rest of the class definition. Rather, the Commission considered as one factor whether the duties and responsibilities of appellant's position were comparable to the management functions exercised at the bureau director level.

> tion chief/district chief in a major complex agency A/E services program, or (6) any other comparable A/E Manager position. (emphasis added) Respondent's posthearing brief, pp. 13-14.

Based on the foregoing and other parts of the record, it is clear that respondent did not rely on the misperception of the law the Court attributed to the Commission.

The Court also observed that "the Commission found that two individuals occupied *positions within the same division or bureau as Mr. Murray does and* perform very, very similar functions to that performed by Mr. Murray and both of those people are section chiefs and both of them are classified at the CE Supervisor - 5 level." T., p. 9. The Court noted that because of the parties' stipulated issue (limiting consideration to either CE - Sup. 4 or A/E Mgr. 1), the Commission did not have the option of placing appellant's position at the same level, [3] but that "it [the Commission] provides no explanation for how it could conclude that the best fit for Mr. Murray was at a level below these two individuals when it was undisputed that he had greater management responsibilities than they did." T., p. 10.

Again, looking at respondent's position on this matter with respect to the classification of these two positions, the record reflects the following definitions for CE Sup. 4 and 5:

> Civil Engineer Supervisor 4
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> This is professional supervisory work in the field of civil engineering performing advanced 2 level work or directly supervising a medium unit (6 to 10 FTE) of senior engineers OR a small unit (1 to 5 FTE) of advanced 1 engineers.
>
> Civil Engineer Supervisor 5
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> This is professional supervisory work in the field of civil engineering directly supervising a large unit (11 or more FTE) of senior engineers OR a medium unit (6 to 10 FTE) of advanced 1 engineers OR subordinate level engineer supervisors.

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[3] The Court apparently perceived CE Sup. 4, CE Sup. 5, and A/E Mgr. 1 as a continuum for classification purposes, and expressed the view that, but for the parties' stipulation to limit the issue to the CE Sup. 4 and A/E Mgr. 1 classifications, the Commission could and should have concluded CE Sup. 5 was the most appropriate classification. However, as discussed below, the CE Sup. and A/E Mgr. 1 classification series are distinctly conceptually different series, and appellant's position did not satisfy the specific criterion for classification at the CE Sup. 5 level of supervising subordinate Senior or Advanced 1 engineers or engineer supervisors.

The distinguishing criterion for classification at the CE Sup. 5 level versus the 4 level is the number and level of subordinates supervised. It is clear that appellant's position satisfies the first CE Sup. 4 allocation by performing "supervisory work in the field of civil engineering performing advanced 2 level work," and that appellant does not supervise any engineers or engineer supervisors, as would be required for classification at the CE 5 level.

Given these facts and these distinctions between the two levels, it follows that respondent had a reasonable basis in fact and law for maintaining appellant at the CE Sup. 4 level in contradistinction to these two positions at the CE Sup. 5 level. To the extent the argument would be made that respondent should have relied on a comparison of the appellant's managerial functions with the managerial functions of these positions in its determination of whether appellant qualified as a "manager" so as to meet the A/E Mgr. statement of inclusions, respondent had a reasonable basis in law and in fact for its approach, because the CE Sup. classification series does not encompass positions that are "predominantly executive and managerial" as does the A/E Mgr. series, but rather "encompasses professionals in the field of civil engineering that are supervisors over a unit of engineers, or other comparable function in the field of engineering." (CE Sup. class specification statement of inclusions). Therefore, although appellant's managerial responsibilities may exceed those of these two CE Sup. 5 positions, this at best is one piece of evidence that supports appellant's claim to have been predominantly managerial; it does not have the same significance as a similar comparison to another A/E Mgr. 1 position.

The distinctions between the CE-Sup. and A/E Mgr. series also run to the Court's comment that: "[w]hile the Schlough position did not have that quality of supervisor [i.e., Schlough had no supervisor with technical expertise in the engineering field] these positions ignored by the Commission [the two CE Sup. 5 section chiefs] show that this is not the per se disqualifying factor that the Commission made it." T., p.10. Again, because these positions are in a different series (CE Sup.) than the classification appellant sought (A/E Mgr.), and their series does not incorporate the "predominantly executive and managerial" criterion found in the A/E Mgr. series, respondent had at least a reasonable basis in law and fact supporting the extent to which it declined to rely on these

CE Sup. 5 positions in deciding to deny the reclassification of appellant's position to AE Mgr. 1.

The Court also criticized the following discussion from the Commission's decision:

> A review of the appellant's position description reflects certain "executive and managerial" worker activities. For example, activities A1, A4, A9, C1, C4, C6, C8, and E1 and goal D fall within the scope of "executive and managerial" functions. But not all of the appellant's activities are in this category and other than the appellant's testimony that activity B1 represented approximately 10% of his overall time allocation, there is no evidence which permits a precise tabulation of the time spent on each activity. Commission Decision, pp. 16-17.

The Court stated that: "to the extent the Commission relied upon its finding that there was no precise tabulation of the time spent by Murray on each activity ... this stands in the face of the unrebutted testimony of Murray and his supervisors. This is an instance where no reasonable person could have made the finding the Commission did from the evidence before it." T., pp. 10-11.

Although the Court, concluded the Commission's "finding" was not *supported by substantial evidence in the record, utilizing the test employed on* a Chapter 227, stats., judicial review, [4] this does not automatically equate to a conclusion that the Commission's observation lacked a reasonable basis under the EAJA, [5] no less a conclusion that the respondent's posture was similarly problematical. To the extent that respondent's position with respect to the major issue in this proceeding (whether appellant qualified as a manager for purposes of inclusion in the A/E Mgr. series) subsumed or relied on the subject matter related to the Commission's observation about the record evidence, respondent's position had a reasonable basis in law and in fact.

The record clearly reflects that appellant's position description does not have a breakdown *of the percentages of time attributable to each specific* worker activity. The record also reflects that neither appellant nor his supervisor testified as to the specific percentages of time attributable to each specific worker activity. The Commission interprets the underscored part of the Court's statement that "this [finding] stands in the face of unrebutted testimony of Murray and his supervisors" (emphasis added), T., pp. 9-10, as a ref-

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[4] See e.g., Copland v. Dept. of Taxation, 16 Wis. 2d 543, 554, 114 N.W. 2d 858 (1962).

[5] See e.g., Sierra Club v. Secretary of the Army, 820 F.2d 513 (1st Cir. 1987).

erence to their conclusory testimony that appellant met the "predominantly managerial" criterion. In any event, assuming that the Court concluded that this relatively general testimony was inconsistent with, and rendered unreasonable the Commission's "finding" or observation that "there is no evidence which permits a precise tabulation of the time spent on each activity," Commission decision, p. 17, the Court's conclusion appears to be more of a criticism of the Commission's analysis of the record rather than running directly to any underlying position of respondent. Respondent certainly had a reasonable basis in law and in fact to have contended that appellant's position was not predominantly managerial, based on, among other things, the lack of specificity in appellant's position description, the fact that the position description for his supervisor (Mr. Eagon) indicates he has the management responsibility for the bureau, including appellant's section, and the testimony of one of respondent's personnel specialists that there is a difference between managing a program for a unit such as appellant's, where the policies have been in place for some time, and performing "executive and managerial" responsibilities as contemplated by the specifications. The other evidence supporting respondent's position includes Mr. Pankratz's testimony concerning the criteria he used to determine whether a position met the definition of predominantly managerial. The Court explicitly concluded that it was appropriate to have considered this testimony as evidence in determining whether appellant's position was predominantly managerial.

The Court also expressed the view that the Commission attached "undue significance ... to the Schlough position" while ignoring "people at the AE Manager 1 level who did have supervisors above them who had specialized expertise as is true in the case of Mr. Murray," as well as "a large number of section chiefs within the Department of Transportation who also have people above them with specialized expertise and yet these people within DOT are classified at a management level." T., p. 12. While the Court concluded that the Commission's evaluation of the evidence in this regard was unreasonable, this conclusion again is not necessarily applicable to respondent's position on the underlying controversy.

Respondent had a reasonable basis in fact and law for attempting to distinguish the positions to which the Court refers. Mr. Schlough's position could be differentiated on the basis of not having a supervisor with technical engineering expertise, as well as supervising engineers performing advanced 2

level work and employes from other disciplines. The record did contain references to other A/E Mgr. positions which resemble appellant in having supervisors with specialized engineering expertise. The fact that these positions had this characteristic does not affect the comparison per se between appellant's and Schlough's positions, because the fact remains that this quality of supervision would be a factor distinguishing the Schlough position from the appellant's position, although obviously it could not be a distinguishing factor between appellant's position and those A/E Mgr. 1 positions. Also, the record does not reflect that respondent ever relied on the argument that the nature of supervision over Schlough (no supervisor with technical engineering expertise) was an absolute requirement for an A/E Mgr. 1 classification.

As for the DOT positions, the record contained neither position descriptions for these positions nor class specifications for their series. Thus, to the extent that the respondent did not rely significantly on these jobs, this record supports the conclusion that it had a reasonable basis for failing to do so. For example, the DOT jobs could be significantly different from appellant's in certain respects which are recognized in the class specifications for that series and which have nothing to do with the type of supervision received, but which contribute to their classification.

In conclusion, while the Court concluded that the Commission's decision of a mixed question of law and fact did not pass muster under the standards applicable to an Administrative Procedure Act judicial review, the record reflects that respondent's position with respect to the underlying controversy had a reasonable basis in fact and in law. In addition to all the evidentiary matter of record supporting respondent's position, it is significant that the Court appeared to rely substantially on what it concluded was an erroneous conclusion of law by the Commission. Yet the record reflects that this legal conclusion, as characterized by the Court, was never advanced by, and cannot be attributed to, the respondent.

ORDER

Appellant's request for attorney's fees and costs is denied, and this matter is finalized in all respects.

Dated: April 6, 1995

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

AJT:jan

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the

Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

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